Supreme Court, U.S.
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No. 90-1579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IMMUNO, A.G.,

Petitioner,

vs.

JAN MOOR-JANKOWSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY MEMORANDUM FOR PETITIONER

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Reply Memorandum For The Petitioner

Respondent has raised three new arguments:

- The Court of Appeals did not rely on *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct.

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[1]Respondent's brief alters the caption by adding "Dr." before his name.

1558, 89 L. Ed. 2d 783 (1986).

- Independent review by this Court is not permissible because the libel *plaintiff* is appealing.

- *Michigan v. Long*, 463 U.S.1032, 103 S. Ct. 3469, 77 L. Ed. 2d 789 (1974), insulates the state court decision from this Court's review based on an incantation of "independent state grounds" at odds with the actual foundation of the decision's reasoning.

Respondent's brief itself shows why the application of *Hepps*, at the summary judgment stage, needs to be clarified: faced with Immuno's legal argument for certiorari, Moor-Jankowski argues facts but denies that this Court should review those facts. As his defense against falsity he pretends not to believe that Immuno would employ an infectiousness test that both he and researchers at Immuno knew about. The appellate courts below turned that into an excuse for foreclosing a jury from trying the issue of falsity—using Moor-Jankowski's dubious "belief" that the test was "impractical" to foreclose a trial of an objective—and material—issue of fact.

Moor-Jankowski argues that the *Hepps* burden played no role in the "state grounds" part of Judge Kaye's decision, but *Hepps* and only *Hepps* was the authority for the Court below requiring the plaintiff to prove falsity.

There is certainly no doubt that the court below recited the incantation which *Michigan v. Long* suggests; but that cannot alter the fact that the analysis itself turns on *Hepps*, which is federal law. The Court of Appeals adopted the findings of the Appellate Division (Pet. App. A-10). The Appellate Division said that the burden on Immuno to prove falsity was constitutionally mandated by *Hepps* (Pet. App. A-69). The Court of Appeals never wavered from that

position. It cited *Hepps* and also referred to two New York cases. However, neither of the state cases cited establishes the burden on plaintiff for proving falsity *under New York law.*[2]

This Court should grant certiorari to clarify the application of *Hepps* on a motion for summary judgment. The Appellate Division held that the charge that Immuno made a proposal that could result in the spread of hepatitis (*see, e.g.*, headline to Editorial Note, Pet. App. A-149) was true, based on that court's subjective determination (adopted by the Court of Appeals without comment) that Immuno would not employ the test to determine infectiousness, even though the record evidence is that such a test existed and Immuno always said it would employ such a test. Moor-Jankowski charged that Immuno submitted a proposal which on its face and of necessity would potentially spread Non-A/Non-B hepatitis in West Africa.[3] It is that fundamental misapplication of *Hepps*, and the concomitant need for a refinement of the *Michigan v. Long* doctrine, which brings Immuno back again to this Court for a determination of what plaintiff's burden is, under *Hepps*, at this stage.

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[2]*Steinhilber v. Alphonse*, 68 N.Y.2d 283, 508 N.Y.S.2d 901, 501 N.E.2d 550 (1986) (opinion vs. fact case); *Silsdorf v. Levine*, 59 N.Y.2d 8, 462 N.Y.S.2d 822, 449 N.E.2d 716, *cert. denied*, 464 U.S. 831, 104 S. Ct. 109, 78 L. Ed. 2d 111 (1983) (held that if a plaintiff alleged falsity of the underlying facts, the opinion privilege did not attach on a motion to dismiss).

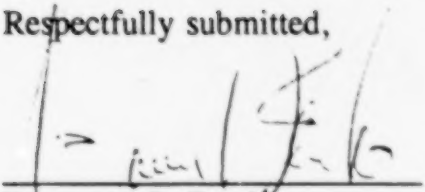
[3]The very headline Moor-Jankowski wrote for his own Editorial Note charged Immuno with "a project with potential to spread Non-A, Non-B hepatitis in West Africa." As pointed out in the Petition (Pet. pp. 20-21), and in the oral argument below (Pet. App. A-101-A-103), it was the falsity of *that* charge which caused Immuno to bring this suit. Disingenuously, Moor-Jankowski omits *his* headline for the Editorial Note from what he carefully claims to be the "entire text" of the alleged libel. Ans. Brf., p. 2.

Moor-Jankowski also says this court cannot review because it must defer to a state-court determination of the facts (Ans. Br. p. 16). But this Court decided in *Bose Corp. v. Consumers' Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), that First Amendment issues require an *independent appellate review of the whole record*. Moor-Jankowski deals with that apparent contradiction by saying that under *Bose* this Court may search the record only for defendants; that this Court may not search the record if a plaintiff complains of a lower court's subjective determination as to falsity. If that is the law then *Bose* means that only defendants can have effective appellate review on the falsity issue. This Court should grant certiorari for the additional purpose of deciding whether or not *Bose* is for defendants only.

Conclusion

Petitioner Immuno, AG therefore respectfully requests that this Court grant its petition to consider the important questions presented and to correct a serious injustice which has precluded it from having its defamation case heard on the merits.

Respectfully submitted,



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